FILE COPY

Supreme Court of the United States

October Term, 1935

No. 388

A. G. Triplett, R. M. Triplett, A. Nelson, C. M. Triplett, Jr., and The Baltimore Gaslight Company,

Petitioners,

vs.

Percival D. Lowell, Francis W. Dunmore, and Dubilier Condenser Corporation,

Respondents.

PETITION.

Samuel E. Darby, Jr.,
Counsel for Petitioners.

Supreme Court of the United States

October Term, 1935

No. 388

A. G. TRIPLETT, R. M. TRIPLETT, A. NELSON, C. M. TRIPLETT, JR., and THE BALTIMORE GASLIGHT COMPANY,

Petitioners,

vs.

PERCIVAL D. LOWELL, FRANCIS W. DUNMORE, and DUBILIER CONDENSER CORPORATION,

Respondents.

PETITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

1. That on the 21st day of August, 1935, petitioners filed a petition for writ of certiorari in this cause directed to the United States Circuit Court of Appeals for the Fourth Circuit.

2. The issues of the case on which review by this Court was sought, had to do with the interpretation and application of the disclaimer sections of the statute (Sections 4917 and 4922 R. S.). It was believed, that the Court of Appeals for the Fourth Circuit had rendered a decision involving the construction and application of the disclaimer sections

of the statute which was in conflict with the decisions of this Court in *Ensten* v. *Simon Ascher & Co.*, 282 U. S. 455 and in *Altoona Publix Theatres* v. *American Tri-Ergon*, 294 U. S. 477, as well as in conflict with the rule under these sections of the statute established in the Second Judicial Circuit.

3. On October 14th, 1935, this Court denied the writ of certiorari prayed for.

4. Within the past week counsel for petitioners has learned that the United States Circuit Court of Appeals for the Seventh Circuit, on October 30th, 1935, rendered a decision in *The Mantle Lamp Company of America* v. *Aluminum Products Company* in which the Circuit Court of Appeals certified to this Court three questions directed to issues with which your petitioners' case is immediately concerned, viz: the interpretation and application of the disclaimer sections of the statute. The certificate in this case was docketed in this Court on November 16, 1935, as No. 590.

5. That the questions so certified to this Court by the Court of Appeals for the Seventh Circuit are as follows:

> "(1) Where certain but not all of the claims of a patent are in suit, and all of the claims in suit are held and decreed to be invalid pursuant to a finding and judgment to that effect of the Circuit Court of Appeals of the Circuit, may the owner of the patent maintain a suit afterward brought thereon in the same judicial circuit as that in which the first cause was decided, and against a different defendant not involved in the first suit—the second suit being based on the claims held in the prior suit to be invalid and on other claims of the same patent not previously adjudicated—where the owner of the patent wholly failed and omitted to file any disclaimer of the claims

held in the first suit to be invalid, and where, between entry of decree of invalidity of the claims in the first suit and the bringing of the second suit in the same circuit, reasonable time had elapsed for filing such disclaimer?

(2) If question 1 is answered in the affirmative, does the intervention of a period of approximately five years between the final judgment in the first suit and the institution in the same circuit of the second suit constitute delay so unreasonable as to bar the second suit for want of disclaimer of the claims which had been held to be invalid?

(3) If question 2 is answered affirmatively, may the institution or pendency of other suits in another judicial circuit or circuits after entry of final decree in the first suit, based on claims of the patent so held invalid and on other claims thereof not previously adjudicated to be invalid, excuse the failure to file disclaimer of the claims held invalid prior to instituting the later suit in the same circuit?"

6. That these questions are apparently limited to the case where a patentee, with claims finally held invalid by the Circuit Court of Appeals, thereafter institutes a suit on the invalid claims *in the same Circuit.* The same question is sought to be determined by petitioners in the case where the patentee institutes a suit on the invalid claims, long after the final adjudication of invalidity, in a Circuit *other* than that in which the final judgment of invalidity was rendered.

7. That in the instant case your petitioners have just received from the Clerk of the Circuit Court of Appeals for the Fourth Circuit an attested copy of an order of that Court entered on November 20th, 1935 (a copy of which is reproduced at the end hereof), wherein the mandate of the Court was recalled and the decree of the Court entered in

the case on the 4th day of June, 1935, was "set aside and annulled" and a new and different decree of the Court entered on November 20th.

8. In the belief that petitioners are entitled to petition this Court to allow an appeal from this new decree within the time allowed by law, subsequent to the entry thereof, petitioners present this present petition for leave to renew their petition heretofore filed on August 21, 1935, on the record of the case filed with the original petition and for a writ of certiorari.

9. That counsel for your petitioners has just been informed that petitioners' case has been set for trial commencing January 6th, 1936, in the District Court of Maryland, and that a long, expensive, technical trial can be avoided if a writ of certiorari is granted in this cause.

10. The issues on the merits involved in petitioners' case are so closely similar to the questions involved in the case of *The Mantle Lamp Company of America* v. *Aluminum Products Company* which has been certified to this Court by the Court of Appeals for the Seventh Circuit that the case may be disposed of on its merits at the same time.

WHEREFORE your petitioners pray that the present petition to permit renewal of their petition for writ of certiorari, as well as for the writ of certiorari, be granted.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioners.

Dated: New York, N. Y.,
November 22, 1935.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOURTH CIRCUIT.

No. 3816.

Percival D. Lowell, Francis W. Dunmore and Dubilier Condenser Corporation,
Appellants and Cross-Appellees,

vs.

A. G. Triplett, R. M. Triplett, A. Nelson, C. M. Triplett, Jr., and The Baltimore Gaslight Company,
Appellees and Cross-Appellants.

CROSS-APPEAL from the District Court of the United States for the District of Maryland.

THE MANDATE OF THIS COURT, issued in the above entitled cause on the 5th day of July, 1935, having been recalled in pursuance of the motion of the appellants and cross-appellees, filed in this cause on August 6, 1935, to recall and amend said mandate by striking therefrom the words "and that the costs be paid by the appellants and cross-appellees" and by inserting in lieu thereof "and that the costs be paid by the appellees and cross-appellants",

IT IS ORDERED BY THIS COURT that the decree of this Court, entered in this cause on the 4th day of June, 1935, be, and the same is hereby, set aside and annulled.

IT IS FURTHER ORDERED, ADJUDGED and DECREED by this Court that the decree of the said District Court, in this

cause, be, and the same is hereby, reversed; that this cause be, and the same is hereby, remanded to the District Court of the United States for the District of Maryland, at Baltimore, for further proceedings in accordance with the opinion of the Court filed herein on June 3, 1935; and that the costs in this Court be divided equally between the appellants and cross-appellees and the appellees and cross-appellants. Let mandate issue forthwith.

November 20, 1935.

MORRIS A. SOPER
U. S. Circuit Judge.

A true copy,
Teste:

CLAUDE M. DEAN Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.